is a nuisance or because he has on a former occasion bitten another person: *McCaskill* v. *Elliot*, 5 Strob. L. 196; *Perry* v. *Phipps*, 10 Ired. L. 259.

"But it would be monstrous to require exemption from all fault, as a condition of existence. That the plaintiff's dog on one occasion stole an egg, and afterwards snapped at the heel of the man who had hotly pursued him, *flagrante delicto;* that on another occasion he barked at the doctor's horse; and that he was shrewdly suspected in early life to have worried sheep, make up a catalogue of offences not very numerous nor of a very heinous character. If such deflections as these from strict propriety be sufficient to give a dog a bad name and kill him, the entire race of those faithful and useful animals might be rightfully extirpated:" *State* v. *Holder*, 81 N. C. 527. Where a defendant justified shooting a dog because it was worrying his fowl, and could not be otherwise prevented, it was held that he must prove that the dog was in the act of worrying the fowl at the very moment he was shot: *Jahson* v. *Brown*, 1 Campb. 41. And the owner of sheep was held not justified in killing a dog for worrying his sheep after he had left them and passed into another field: *Wells* v. *Head*, 4 C. & P. 568. Where the defendant was passing the house of the owner of the dog, and it ran out and bit his gaiter, and on his turning around and raising his gun, it ran away and he shot it as it was running from him, he was held not justified in the act, for the killing was not done in self-defence: *Morris* v. *Nugent*, 7 C. & P. 572; *Hanway* v. *Boultbee*, 4 C. & P. 350; s. c. 1 M. & Rob. 15.

W. W. THORNTON.

Crawfordsville, Ind.

Supreme Court of Kansas.

STATE v. MOWRY.

An insane, uncontrollable impulse, is not sufficient to destroy the criminal responsibility of the accused, when he knows the nature and consequences of the particular acts charged against him, and that they are wrong.

Where a person is charged with having committed murder in the first degree whilst intoxicated, the jury may take his intoxication into consideration, not as an excuse, but in determining whether he was capable of that premeditation and intent to kill which are the necessary elements of the crime.

It is murder for a person to kill one who he knows is pursuing him for a felony which he has just committed.

APPEAL from the District Court of Cowley County.

S. B. Bradford, *Atty.-General*, and *C. L. Swarts*, for the State.

Jennings & Troup and *Irwin Taylor*, for the appellant.

JOHNSTON, J. (October 8, 1887).—At the April Term, 1886, of the District Court of Cowley County, Henry Mowry was

prosecuted and convicted for the murder of James P. Smith. He seeks a reversal, on the alleged insufficiency of the evidence and supposed errors in charging the jury. It is conceded that he shot and killed Smith on the afternoon of April 21, 1886; but he defended on the ground that he was insane and irresponsible. There is testimony, that in December, 1884, he began boarding at the house of O. F. Godfrey, his partner in business, whose family consisted of himself, his wife, and two children. While boarding there he became enamored with Mrs. Godfrey, and frequently declared his love for her. She listened to his protestations of love for some time without informing her husband, but later she discouraged his attentions, and requested him to remain away from the house. He then became moody and morose, and declared that it was more than he could bear to be separated from her. About this time he had an interview with his mother, who testifies that he was then in great distress of mind because of the cold treatment received from Mrs. Godfrey. He declared his affection for her, stating that she had encouraged his attentions at first, and that he had had illicit connection with her, and was the father of her infant child, but that now she repulsed him, and he begged his mother to intercede with Mrs. Godfrey to allow him to continue his visits at her house. On the morning of August 21, 1885, the day that Smith was killed, he called on Mrs. Godfrey, and again begged her to renew her former relations with him; but she refused, and stated that she would inform Mr. Godfrey of his conduct towards her. He then asked if anything occurred by which she should be without home, friends, or money, she would call upon him, and inquired if she would marry him in case anything should happen to Mr. Godfrey. She told him she would not, and he said, "That settles it: we can't be friends any longer;" and left the house. Later in the day he returned to the house, and found Mrs. Godfrey alone, when he demanded to know whether she intended to tell Mr. Godfrey upon him as she had threatened to do. She informed him that she would, and he replied that he would just as soon shoot her, and he thought he would do it before night. He had a shotgun with him, and during the parley,

pointed it at her. She ordered him to leave the house, saying that she would call her son Frank and send him for her husband, and she followed him out of the house and did call her son and directed him to go and bring his father. After leaving the house he met Mr. Godfrey, and informed him that he had had trouble with his wife, and that she had a story to tell him; to go down to the house and hear it; and he asked him if he would promise to come back and hear his side of the story. This was agreed to by Mr. Godfrey, who immediately went to the house and had an interview with his wife, and returned to the hotel, where he again met Mowry. Mowry inquired if Mrs. Godfrey had told her story, and Mr. Godfrey replied that she had, and informed him that he could not come to the house again. Mowry then insisted that he should listen to his story, stating to Godfrey that the youngest child was his, and that he was going to have it; that he would spend every dollar he had on earth, but what he would ruin the family or have that child. Godfrey left him at once and returned to his home, and had been there but a short time when he discovered Mowry coming towards the house with a shotgun in his hand. Godfrey immediately took his gun and went to the front door, and as Mowry started through the gate towards the house, he ordered him to go. Mowry said, "I don't have to," and stepped back in the street. At this time Mrs. Godfrey ran in front of her husband, who pushed her aside, and Mowry then raised his gun and fired two shots through a window in that part of the house to which Mrs. Godfrey had been pushed. Mrs. Godfrey ran and called some workmen who were engaged upon a building near by for help. Mowry immediately started away from the house, reloading his gun as he went. He was pursued by a large number of persons who were in the vicinity. Smith, the deceased, was in the lead of those in pursuit of Mowry, and gained on him as they ran. When Smith came up within about fifteen feet, Mowry turned with his gun and ordered Smith to halt, which he momentarily did. Mowry ran on again, followed by Smith, when he turned, brought his gun up, and halted Smith a second time. There was only a brief halt, for Mowry made another dash to

escape, but was still pursued by Smith, who was closing in on him, when Mowry turned, and a third time ordered him to stop, and almost at the same time fired at Smith, discharging a load of shot into his face and neck. Some one near by came up where Smith fell, and the only words he was heard to utter were, "Catch that man," and he died within a few minutes after he was shot. Mowry was pursued until he was captured, but not until he had shot another of his pursuers. There is testimony that, after his capture, he stated that he shot at Mrs. Godfrey, and supposed he had killed her; and further, when told that he had killed Smith, he said that he was sorry he shot him; that he had told him three times to stop and he would not do it, when he shot him; and that he would do the same thing again.

It is insisted by counsel for the appellant that his conduct towards Mrs. Godfrey, and his acts immediately before and after the homicide, are evidence of insanity. They offered testimony tending to show that he acted differently about the time of the homicide than he had before in this; that he was moody and morose, restless at night, and absent-minded in the day-time, complaining of pain in his head, and on several occasions becoming excited when he would yell, cry, laugh, and sob by turns, breaking furniture, and threatening to injure and kill those who were his friends. And that these and other incidents, all of which have not been mentioned, show unsoundness of mind. Some of the medical experts expressed the opinion that a person acting in the manner in which Mowry was represented to have acted must have been insane, and some of them characterized it as an epileptic mania. On the other side it is insisted that there was a complete failure to support the plea of insanity; that his conduct showed an infatuation, illicit, and without hope; that when he was repulsed by Mrs. Godfrey, he schemed to separate her from her husband by telling him that she was unfaithful to him, and that he was not the father of the infant child, and also by threatening to ruin the family if the child was not given up, and that his purpose was further disclosed when he asked her to be his wife in case of Godfrey's death. There is testimony that he purchased a bottle of liquor shortly

before the shooting, and several of the witnesses say that he appeared to be drinking and drunk upon that day. It is claimed that partial intoxication accounts for some of his strange and unusual actions, and that, when his relations with Mrs. Godfrey had been exposed, and he had failed to intimidate Godfrey and cause him to part from his wife, he then drank liquor to nerve him for what he was about to undertake, deliberately secured a gun, loaded it, and provided himself with ammunition, and called at Godfrey's house for the purpose of killing Mrs. Godfrey, and sought to carry out that purpose by shooting into the room where he supposed her to be.

We will not undertake, nor is it necessary, to give a detailed statement of the mass of testimony which was taken in the case. We have examined it carefully, and we readily reach the conclusion that the verdict of the jury ought not to be disturbed. There is much in the testimony showing design, and intelligent efforts to accomplish it. His consciousness of guilt, his fear and efforts to escape after committing the felony at Godfrey's house, his coolness and deliberation in three times halting his pursuer, and in firing the fatal shot, and his subsequent recollection of all that transpired during his flight and capture make an exceedingly strong case showing responsibility, and it is difficult to see how the jury could have reached a different result.

There is an objection made to an instruction, wherein the Court states the test of responsibility in a prosecution where insanity is asserted as a defence. The Court directed the jury that "if he was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that what he was doing was wrong, then the law does not hold him responsible for his act. On the other hand, if he was capable of understanding what he was doing, and had the power to know that his act was wrong, then the law will hold him criminally responsible for it. * * * If this power of discrimination exists he will not be exempted from punishment because he may be a person of weak intellect, or one whose moral perceptions are blunted or illy developed, or

because his mind may be depressed or distracted from brooding over misfortunes or disappointment, or because he may be wrought up to the most intense mental excitement from sentiments of jealousy, anger, or revenge. * * * The law recognizes no form of insanity, although the mental faculties may be disordered or deranged, which will furnish one immunity from punishment for an act declared by law to be criminal, so long as the person committing the act had the capacity to know what he was doing, and the power to know that his act was wrong." We think the Court stated the correct rule of responsibility where insanity is asserted as a defence. The "right and wrong test" was approved by this Court in *State* v. *Nixon*, 32 Kan. 205. It is there said that "where a person, at the time of the commission of an alleged crime, has sufficient mental capacity to understand the nature and quality of the particular act or acts constituting the crime, and the mental capacity to know whether they are right or wrong, he is generally responsible if he commits such act or acts, whatever may be his capacity in other particulars; but if he does not possess this degree of capacity, then he is not so responsible." This test has received the almost universal sanction of the Courts of this country: Lawson, Insan. 231–270.

The defendant urges that the instruction is erroneous, because it excluded the theory of an irresistible impulse or moral insanity. This question received the attention of the Court, and was practically decided in *State* v. *Nixon*, *supra*, although the question was not fairly presented in that case. It is there recognized as a dangerous doctrine, to sustain which would jeopardize the interests of society and the security of life. Mr. Justice VALENTINE says that "it is possible that an insane, uncontrollable impulse is sometimes sufficient to destroy criminal responsibility, but this is probably so only when it destroys the power of the accused to comprehend rationally the nature, character, and the consequences of the particular act or acts charged against him, and not where the accused still has the power of knowing the character of the particular act or acts, and that they are wrong." Further along he says that "the law will hardly

recognize the theory that any uncontrollable impulse may so take possession of a man's faculties and powers as to compel him to do what he knows to be wrong and a crime, and thereby relieve him from all criminal responsibility. Whenever a man understands the nature and character of an act, and knows that it is wrong, it would seem that he ought to be held legally responsible for the commission of it, if in fact he does commit it." In a very recent case the Supreme Court of Missouri considered the refusal of the trial Court to charge that, if the defendant obeyed an uncontrollable impulse springing from an insane delusion, he should be acquitted. The Court repudiated that doctrine, and Judge SHERWOOD remarked, in deciding the case, that "it will be a sad day for this State when uncontrollable impulse shall dictate a rule of action to our Courts:" *State* v. *Pagels*, 92 Mo. 300. It is true that a few of the Courts have adopted this principle, but by far the greater number have disapproved of it, and have adopted the test which was given in the present case: Lawson, Insan. 270, 308.

The Court was requested to instruct that, if there was a reasonable doubt as to whether the defendant was intoxicated or insane at the time the offence was committed, there must be an acquittal. This request was properly refused. Insanity is a defence, and upon that question the jury were correctly charged; but a reasonable doubt of the defendant's intoxication, or even if his drunkenness at the time was undoubted, it would not necessarily exempt him from legal responsibility. While voluntary intoxication is no excuse for crime, yet where the crime charged is murder in the first degree, which involves the condition of the mind when the act was committed, drunkenness may be considered by the jury in determining whether there was that deliberation, premeditation, and intent to kill necessary to constitute the offence. This principle was fairly stated to the jury, and the elements of the crime charged, together with the doctrine of reasonable doubt, were fully placed before the jury.

Complaint is made of a charge of the Court relating to arrest. On this subject the Court instructed that, "where a felony has been recently committed by any person, and a

private citizen has reasonable cause to suspect that such person is guilty of its commission, the law authorizes such private citizen, while acting in good faith, to arrest the person who has committed the felony in order to prevent his escape, and in so doing he may use such personal force as appears necessary, under the circumstances, to effect the arrest; and, in such case, if the person whose arrest is attempted has reasonable grounds for believing that is the actual intention of the person attempting the arrest, and his motives for so doing, he would not be justifiable in law in resisting the arrest." This instruction is correct, and applicable to the facts in the case. Mowry had committed a felony and was instantly pursued by the deceased in an endeavor to arrest him. The deceased was pursuing him in a temperate and proper manner, without arms and without violence, to make the arrest. He had the right to make the arrest in this manner without a warrant, and hence the request for an instruction upon the subject of a void and illegal arrest was properly refused, and the argument of the appellant upon that question does not apply.

Neither is there any force in the objection that the testimony fails to show that Mowry was not notified nor aware of the purpose of the deceased in pursuing him. Notice is only required to give the person an opportunity to desist from flight and unlawful action, and to peaceably surrender. If he necessarily knows the purpose of the pursuit and attempted arrest no notice is needed. It is murder for a person to kill one who he knows is pursuing him for a felony which he has just committed; and it has been said that "where a party has been apprehended in the commission of a felony, or on fresh pursuit, notice of the crime is not necessary, because he must know the reason why he is apprehended:" Whart. Crim. Law, 418.

The further objection is made that the Court failed to charge the jury upon the law of all the degrees of the crime of homicide inferior to and included in the one charged. The jury were instructed on the law of murder in the first and second degrees, and also upon the law of the third and fourth degrees of manslaughter. There was no testimony tending to show that the defendant was guilty of manslaughter

in either the first or second degree; and, therefore, no instruction on those degrees was required or proper. The instructions should conform to the testimony of the case. If there is slight evidence even that the defendant may have committed a degree of the offence inferior to and included in the one charged, the law of such inferior degree ought to be given, but should never be given upon a degree of the offence which the evidence does not tend to prove. An instruction upon either the first or second degrees of manslaughter would not have been wholly inapplicable to the facts in the case, and might have confused and misled the jury. The action of the Court in this respect was not erroneous: *State* v. *Mize*, 36 Kan. 187; *State* v. *Rhea*, 25 Id. 576; *State* v. *Hendricks*, 32 Id. 566.

There are other exceptions to the charge, none of which are regarded to be material, and examination of the entire record satisfies us that the case was fairly tried, and that no sufficient ground for a reversal exists.

The judgment of the District Court will therefore be affirmed. (All the justices concurring.)

It is an axiomatic rule of the law, thoroughly grounded upon public policy, that voluntary intoxication furnishes no excuse for crime committed under its influence, even if the intoxication is so extreme as to make the author of the crime unconscious of what he is doing, or to create a temporary insanity. There is a host of authorities affirming this proposition: *Upstone* v. *People*, 109 Ill. 169; *Rafferty* v. *People*, 66 Id. 118; *McIntyre* v. *People*, 38 Id. 514; *Marshall* v. *State*, 59 Ga. 154; *Golden* v. *State*, 25 Id. 527; *Mercer* v. *State*, 17 Id. 146; *Hanvey* v. *State*, 68 Id. 612; *Henry* v. *State*, 33 Id. 441; *Choice* v. *State*, 31 Id. 424; *Estes* v. *State*, 55 Ga. 31; *U. S.* v. *Clarke*, 2 Cranch (C. C.), 158; *U. S.* v. *Drew*, 5 Mason (C. C.), 28; *U. S.* v. *McGlue*, 1 Curt. (C. C.) 1; *Respublica* v. *Weidle*, 2 Dall. 88; *Commonwealth* v. *Hawkins*, 3 Gray (Mass.), 464; *Commonwealth* v. *Malone*, 114 Mass. 295; *People* v. *Pine*, 2 Barb. (N. Y.) 566; *People* v. *Rogers*, 18 N. Y. 9; *Kenny* v. *People*, 31 Id. 330; *Flanigan* v. *People*, 86 Id. 554; *State* v. *Paulk*, 18 S. Car. 514; *State* v. *McCants*, 1 Spear (S. C.), 384; *State* v. *Stark*, 1 Strob. (S. Car.) 479; *People* v. *Garbutt*, 17 Mich. 19; *Roberts* v. *People*, 19 Id. 401; *Tyra* v. *Commonwealth*, 2 Metc. (Ky.) 1; *Smith* v. *Commonwealth*, 1 Duvall (Ky.), 224; *Golliher* v. *Commonwealth*, 2 Id. 163; *Krill* v. *Commonwealth*, 5 Bush (Ky.), 362; *Curry* v. *Commonwealth*, 2 Id. 67; *Blimm* v. *Commonwealth*, 7 Id. 320; *Shannahan* v. *Commonwealth*, 8 Id. 463; *Scott* v. *State*, 12 Tex. App. 31; *Carter* v. *State*, 12 Id. 500; *Jeffries* v. *State*, 9 Tex. App. 598; *Outlaw* v. *State*, 35 Tex. 481; *Colbath* v. *State*,

2 Tex. App. 391; *Ferrell* v. *State*, 43 Tex. 503; *Brown* v. *State*, 4 Tex. App. 275; *McCarty* v. *State*, Id. 461; *Wenz* v. *State*, 1 Id. 36; *State* v. *Dearing*, 65 Mo. 530; *State* v. *Sneed*, 88 Id. 138; *State* v. *Harlow*, 21 Id. 446; *Whitney* v. *State*, 8 Id. 165; *Scholler* v. *State*, 14 Id. 502; *State* v. *Lowe*, S. Ct. Mo. November 28, 1887; *Reed* v. *Harper*, 25 Iowa, 87; *Williams* v. *State*, 81 Ala. 1; *State* v. *Bullock*, 13 Id. 413; *Ford* v. *State*, 71 Id. 385; *Tidwell* v. *State*, 70 Id. 33; *Mooney* v. *State*, 33 Id. 419; *State* v. *John*, 8 Ired. (N. Car.) 330; *Swan* v. *State*, 4 Humph. (Tenn.) 136; *Haile* v. *State*, 11 Id. 154; *Pirtle* v. *State*, 9 Id. 663; *Cornwall* v. *State*, Mart. & Yerg. (Tenn.) 147; *Lancaster* v. *State*, 2 Lea (Tenn.), 575; *Clark* v *State*, 8 Humph. (Tenn.) 671; *Pennsylvania* v. *McFall*, Addison (Pa.), 255; *McGinnis* v. *Commonwealth*, 102 Pa. St. 66; *Kelly* v. *Commonwealth*, 1 Grant Cas. (Pa.) 484; *Jones* v. *Commonwealth*, 75 Pa. St. 403; *Keenan* v. *Commonwealth*, 44 Id. 55; *Commonwealth* v. *Hart*, 2 Brewst. (Pa.) 546; *Roswell* v. *Commonwealth*, 20 Gratt. (Va.) 860; *Commonwealth* v. *Jones*, 1 Leigh (Va.), 598; *State* v. *White*, 14 Kan. 538; *State* v. *Mowry*, *supra*; *State* v. *Horne*, 9 Kan. 119; *Smurr* v. *State*, 88 Ind. 504; *Gillooley* v. *State*, 58 Id. 82; *Sanders* v. *State*, 94 Id. 147; *Dawson* v. *State*, 16 Id. 428; *People* v. *Lewis*, 36 Cal. 531; *People* v. *King*, 27 Id. 507; *People* v. *Belencia*, 21 Id. 544; *People* v. *Williams*, 43 Id. 344; *State* v. *Welch*, 21 Minn. 22; *State* v. *Coleman*, 27 La. Ann. 691; *State* v. *Johnson*, 41 Conn. 584; *Casat* v. *State*, 40 Ark. 511; *Kelly* v. *State*, 3 Sm. & M. (Miss.) 518; *State* v. *Thompson*, 12 Nevada, 140; *People* v. *Odell*, 1 Dak. Ter. 197; *Smith* v. *State*, 4 Neb. 277; *Hamilton* v. *Granger*, 5 H. & N. 40; *Rex* v. *Ayres*, Russ. & Ry. 166; *Rex* v. *Thomas*, 7 C. & P. 817; *Rex* v. *Meakin*, Id. 297; *Reg.* v. *Gamlen*, 1 Fost. & F. 90; *Burrow's Case*, 1 Lewin, 75; *Rennie's Case*, Id. 76; *Pearson's Case*, 2 Id. 144; *Reg.* v. *Doody*, 6 Cox C. C. 463; *Reg.* v. *Monkhouse*, 4 Id. 55; 1 Russ. Cr. (9th ed.) 12; 1 Whart. Cr. L. (8th ed.) § 51; 1 Bish. Cr. L. (6th ed.) § 414.

"The third sort of *dementia* is that which is *dementia affectata*, namely, drunkenness. This vice doth deprive men of the use of reason, and puts many men into a perfect but temporary frenzy. * * * Such a person shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses:" Hale, P. C. 32. And in *Beverley's Case*, 4 Co. 123 *b*, Lord COKE says, "Although he who is drunk is for the time *non compos mentis*, yet this drunkenness does not extenuate his act as an offence, nor turn to his avail; but it is a great offence in itself, and therefore aggravates his offence, and doth not derogate from the act which he did during that time, and that as well in cases touching his life, his lands, his goods, as anything that concerns him."

In *Smith* v. *Commonwealth*, 1 Duvall (Ky.), 224, it was held that temporary drunkenness may, in respect to responsibility, be treated as temporary insanity; but this was repudiated in *Shannahan* v. *Commonwealth*, 8 Bush (Ky.), 463; see Wharton's Crim. L. (9th ed.) § 49.

It makes no difference that a man by constitutional infirmity, or by accidental injury to the head or brain, is more liable to be maddened by liquor than another man. If he has legal memory and discretion when sober, and voluntarily deprives himself of reason, he is responsible for his acts in that condition. But if a man is insane when sober, the fact that he increased the insanity by the superadded excitement of liquor, does not thereby

make himself responsible for his acts in that condition: *Choice* v. *State*, 31 Ga. 424. And in *Roberts* v. *People*, 19 Mich. 401, it was held that if a person be subject to a tendency to insanity, of which he is ignorant, and which is liable to be excited by intoxication, and if in consequence of intoxication, though voluntary, his mental faculties become excited to diseased action to such an extent that he does not know what he is doing or why he is doing it; or if he is conscious of this, he is not conscious of any object in doing it, or if he does not know what he is doing or that the means he is using are adapted or likely to kill; or, though conscious of all these, yet, if the diseased action of his mind has so far overcome or perverted his reason that he does not know what he is doing is wrong, then he will not be held responsible for the intoxication or its consequences. And in *People* v. *Cummins*, 47 Mich. 335, it was held, that where the defence of temporary insanity proceeds upon the theory that it was induced by the operation of strong drink upon a mind rendered unsound by an injury to the brain, it is error to leave the question of criminal responsibility to be determined upon the facts of injury and mental unsoundness alone, or upon the effect of intoxication, apart from the other facts.

The reason for the doctrine.—Judge Cooley, in *People* v. *Garbutt*, 17 Mich. 19, states the ground upon which this doctrine is held, quite strongly. He says: "A doctrine like this, to wit, that drunkenness should excuse, would be a most alarming one to admit in the criminal jurisprudence of the country, and we think that the recorder was right in rejecting it. A man who voluntarily puts himself in condition to have no control of his actions, must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and since it is so often resorted to as a means of nerving the person up to the commission of some desperate act, and is withal so inexcusable in itself, that the law has never recognized it as an excuse for crime." And in *People* v. *Rogers*, 18 N. Y. 9, the Court say: "It will occur to every mind that such a principle is absolutely essential to the protection of life and property. In the forum of conscience there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect, and the reckless taking of life by one infuriated by intoxication; but human laws are based upon considerations of policy, and look rather to the maintenance of personal security and social order, than to an accurate discrimination as to the moral qualities of individual guilt. But there is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is a duty which every one owes to his fellowmen and to society, to say nothing of more solemn obligations, to preserve, so far as lies in his own power, the inestimable gift of reason. If it is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable. But if by a voluntary act he temporarily casts off the restraints of reason and conscience, no wrong is done him if he is considered answerable for any injury which in that state he may do to society."

The intoxication must be voluntary.—If a person by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causes frenzy, this puts him in the same condition with any other

frenzy, and equally excuses him: Russell on Crimes (5th ed.), 114. See, also, Bishop Crim. Law, § 405, citing *Pearson's Case*, 2 Lewin, 144; 1 Hale P. C. 32; *People* v. *Robinson*, 2 Park (N. Y.) C. C. 235; *Choice* v. *State*, 31 Ga. 424; *Bartholomew* v. *People*, 104 Ill. 605.

Delirium tremens.—The rule that intoxication creates no exemption from criminal responsibility does not apply to *delirium tremens*, which, although like many other kinds of mania the result of prior vicious indulgence, is always shunned rather than courted by the patient, and is not voluntarily assumed, either as a cloak for guilt, or to nerve the perpetrator to the commission of a crime. It is regarded as an insanity or diseased state of the mind, which affects responsibility for crime in the same way as insanity produced from any other cause: *Maconnchey* v. *State*, 5 Ohio St. 77; *People* v. *Williams*, 43 Cal. 344; *Bailey* v. *State*, 26 Ind. 422; *Dawson* v. *State*, 16 Id. 428; *Fisher* v. *State*, 64 Id. 435; *Cluck* v. *State*, 40 Id. 263; *Bradley* v. *State*, 31 Id. 492; *Gates* v. *Meredith*, 7 Id. 440; *Erwin* v. *State*, 10 Tex. App. 700; *Beasley* v. *State*, 50 Ala. 149; *State* v. *Hundley*, 46 Mo. 414; *Lanergan* v. *People*, 50 Barb. (N. Y.) 266; *Roberts* v. *People*, 19 Mich. 401; *People* v. *Bell*, 49 Cal. 485; *U. S.* v. *Drew*, 5 Mason (C. C.) 28; *U. S.* v. *Forbes*, Crabbe, 558; *U. S.* v. *Clarke*, 2 Cranch, 158; *Cornwell* v. *State*, Mart. & Yerg. (Tenn.) 147; *Carter* v. *State*, 12 Tex. 500; *U. S.* v. *McGlue*, 1 Curtis, 1; *Bales* v. *State*, 3 W. Va. 685; *Boswell* v. *Commonwealth*, 20 Gratt. (Va.) 860; *Bliss* v. *Conn. etc. R. Co.*, 24 Vt. 424; *Commonwealth* v. *Green*, 1 Ashm. (Pa.) 289; *Smith* v. *Commonwealth*, 1 Duv. (Ky.) 224; *Tyra* v. *Commonwealth*, 2 Metc. (Ky.) 1; *State* v. *McGonigal*, 5 Harr. (Del.) 510; *Rex* v. *Davis*, 14 Cox C. C. 563; *Lanergan* v. *People*, 50 Barb. (N. Y.) 266; *Kenny* v. *People*, 31 N. Y. 330; *People* v. *Rogers*, 18 Id. 9. It is only of habitual insanity, when proved once to have existed, that the law entertains the presumption that it continues until the contrary is shown. It is otherwise with spasmodic, temporary mania. So, when delirium tremens is relied upon as a defence, it must be shown affirmatively that the accused was under the delirium at the time of the act; no presumption that he was so will arise from the fact that he had prior attacks of the same malady: *State* v. *Sewell*, 3 Jones (N. Car.) L. 245; *State* v. *Reddick*, 7 Kan. 143; *People* v. *Francis*, 38 Cal. 183; 1 Arch. Crim. Prac. & Pl. (8th ed.) 29.

Where one's defence to the charge of murder was temporary insanity, caused by intoxicating liquors, and known as "mania a potu" or delirium tremens, the Court held that the charge to the jury need not use either of these terms, nor define the various types of insanity, provided the charge were sufficiently comprehensive to embrace the class of insanity in question: *Stuart* v. *State*, 57 Tenn. 178.

Insanity produced by drink.—Not only does delirium tremens render a person irresponsible, but the mind may be overthrown and permanent insanity may be produced by long-continued habits of excessive drinking, without any violent delirium tremens as the result: *Bailey* v. *State*, 26 Ind. 422; *State* v. *Pike*, 49 N. H. 399; 1 Arch. Crim. Prac. & Pl. (8th ed.) 29. In *U. S.* v. *Drew*, 5 Mason, 28, Justice STORY says: "The question made at the bar is, whether insanity whose remote cause is habitual drunkenness, is or is not an excuse in a court of law for a homicide committed by the party while so insane, but not at the time

intoxicated or under the influence of liquor. We are clearly of opinion that insanity is a competent excuse in such a case. In general, insanity is an excuse for the commission of every crime, because the party has not the possession of that reason which includes responsibility. An exception is, when the crime is committed by the party while in a fit of intoxication, the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. But the crime must take place and be the immediate result of the fit of intoxication, and while it lasts; and not, as in this case, a remote consequence superinduced by antecedent exhaustion of the party arising from gross and habitual drunkenness. However criminal in a moral point of view such indulgence is, and however justly a party may be responsible for his acts arising from it to Almighty God, human tribunals are generally restricted from punishing them, since they are not the acts of a reasonable being. Had the crime been committed while Drew was in a fit of intoxication, he would have been liable to have been convicted of murder. As he was not then intoxicated, but merely insane from an abstinence from liquor, he cannot be pronounced guilty of the offence. The law looks to the immediate and not to the remote cause; to the actual state of the party and not to the causes which lately produced it. Many species of insanity arise remotely from what, in a moral view, is a criminal neglect or fault of the party, as from religious melancholy, undue exposure, extravagant pride, ambition, etc. Yet such insanity has always been deemed a sufficient excuse for any crime done under its influence."

In charging the jury the Court said (*Cornwell* v. *State*, Mart. & Yerg. (Tenn.) 147): "If at the time the homicide was committed the prisoner had not sufficient understanding to distinguish right from wrong, and was in a state of insanity, it would be excusable, but that must be proved; if his insanity or bad conduct arose from drunkenness it was no excuse. There may be cases where insanity is produced by long-continued habits of intoxication; but it must be a permanent insanity. Insanity which is the immediate effect of intoxication is no excuse, the party being fully responsible for all his acts." A verdict of guilty upon this charge was affirmed by the court of appeal. The authorities support this position without exception. See cases cited to "delirium tremens," *supra*, and, also, *Bradley* v. *State*, 31 Ind. 492; *Burrow's Case*, 1 Lewin, 75; *Rennie's Case*, Id. 76; *Roberts* v. *People*, 19 Mich. 401; *Upstone* v. *People*, 109 Ill. 169; *Boswell* v. *Commonwealth*, 20 Gratt (Va.), 860; *Flanigan* v. *People*, 86 N. Y. 554; *Commonwealth* v. *Green*, 1 Ash. (Pa.) 289; *Bennett* v. *State*, Mart. & Yerg. (Tenn.) 133; *Beasley* v. *State*, 50 Ala. 149; *Fisher* v. *State*, 64 Ind. 435; *State* v. *Robinson*, 20 W. Va. 713; *State* v. *Paulk*, 18 S. Car. 514.

In Indiana it has been held that where the defendant's mind is so far destroyed by a long-continued habit of drunkenness as to render him mentally incompetent, intentionally and knowingly to commit larceny, he should be acquitted, although he was intoxicated at the time he took the property: *Bailey* v. *State*, 26 Ind. 422. And in *Upstone* v. *People*, 109 Ill. 169, it was held that on the trial of a defendant for murder, when insanity is set up in defence, and he is shown to have been intoxicated at the time of the homicide, evidence of his

previous intoxication will be properly received from the prosecution, as bearing upon the question of intoxication at the time of the killing and of the conduct of the defendant while in that state.

Dipsomania. The existence of a disease called *dipsomania*, which overmasters the will of its victim, and irresistibly compels him to drink to intoxication, is a question of fact for the jury: *State* v. *Pike*, 49 N. H. 399. In this case the Court say: "If there are any diseases whose existence is so much a matter of history and general knowledge, that the Court may properly assume it in charging a jury, *dipsomania*, certainly, does not fall within that class. The Court do not profess to have the qualifications of medical experts. Whether there is such a disease as *dipsomania* is a question of science and fact, and not of law."

"We presume," says Bishop, Crim. Law (7th ed.), § 407, "that there are Courts which will not not permit that defence to be introduced; but other Courts have allowed it, and have held that the questions whether there is such a disease, and whether the act was committed under its influence, are not questions of law but of fact for the jury. Still, looking at such an inquiry as a mere search after facts, it is obvious that, to distinguish a case of this sort from one of mere inordinate appetite may be difficult, requiring of judges and jurors great caution." And see *People* v. *Blake*, 65 Cal. 275, where it was held that evidence of *dipsomania* is admissible for the defence, in a forgery case.

Drunkenness as an aggravation. It was formerly held that drunkenness was an aggravation, rather than an excuse for crime: *Beverly's Case*, 4 Co. 123 *b*; *People* v. *Porter*, 2 Park. (N. Y.) C. C. 14; *Commonwealth* v. *Hart*, 2 Brewst. (Pa.) 546. But such is clearly not now the law. In *Ferrell* v. *State*, 43 Tex. 503, it was said that "the Court below told the jury that the condition of the defendant at the time of the homicide, the result of intoxication, was an aggravation of the offence, and should be so regarded by the jury; thus, in effect, telling them if the defendant was intoxicated, he might be properly convicted of a higher grade of offence than the facts otherwise required; for, it will be observed, it is the offence and not its penalty, which the Court tells the jury is aggravated by the appellant's intoxication. It is needless for us to say that the law of this State gives no warrant for such doctrine. While intoxication is no excuse, much less justification for crime, it is certainly a startling idea that the bare fact of one being in this condition when the homicide is committed, converts murder in the second, to murder in the first degree, or will authorize, if not require, the jury to impose the penalty of death or confinement for life, instead of a term of years. This would be directly the reverse of the rule laid down by the Code, and would make the fact that the homicide was committed when the perpetrator was incapable of a deliberate intention and formed design to take life or do other serious bodily injury for want of a sedate mind, an aggravation instead of a mitigation of the heinousness of murder." See, also, *McIntyre* v. *People*, 38 Ill. 515; *State* v. *Donovan*, 61 Iowa, 369; *U. S.* v. *Forbes*, Crabbe, 559. The U. S. District Court (W. D. Mo. Sept. T. 1882) in *U. S.* v. *Claypool*, 14 Fed. Rep. 127, held, that when resorted to, to blunt the moral responsibility, drunkenness heightens the culpability of the offender.

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